(24)

FILED
JAN 4 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners and Respondents Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MILO J. WARNER,
1631 Nicholas Bldg.,
Toledo, Ohio,

HALL & DEVLIN,
528 Nicholas Bldg.,
Toledo, Ohio,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1942

No.....

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners and Respondents Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

MILO J. WARNER,
1631 Nicholas Bldg.,
Toledo, Ohio,

HALL & DEVLIN,
528 Nicholas Bldg.,
Toledo, Ohio,
Counsel for Petitioners.

SUBJECT INDEX

Page

Petition for Writ of Certiorari..... 1

I. Summary Statement of the Matter Involved..... 1

II. The Basis for the Jurisdiction of This Court to Review the Decree in Question..... 3

III. Questions Presented 4

IV. Reasons Relied on for the Allowance of the Writ 5

Brief in Support of Petition for Writ of Certiorari.... 7

I. Opinions Below 7

II. Jurisdiction. 7

III. Statement of the Case..... 8

IV. Specification of Error..... 15

V. Argument 16

Point 1. Said Circuit Court of Appeals Erred in Holding that the Board's Finding that The Gerity-Whitaker Company Transferred Operations to Blissfield and Adrian, Michigan, to Evade Obligations Under a Contract with the Union and Set Up a "Runaway Shop" in Violation of Sec. 8(5) of the Act Was Supported by Substantial Evidence..... 16

Point 2. The Finding of the Board that Gerity-Adrian Manufacturing Corporation was the "Alter Ego" and Agent of The Gerity-Whitaker Company and was Founded by The Gerity-Whitaker Company to Interfere With, Restrain and Coerce Its Employees in Violation of Section 8(1) of the Act Is Not Supported by Substantial Evidence and Its Conclusion of Law and Order for Reinstatement with Back Pay Allowances to Thirty-one Designated Persons Is Erroneous..... 22

Point 3. The Remedy Invoked by the Board Upon Its Findings of Fact and Conclusions of Law Is an Unlawful Order and the Court of Appeals Erred in Holding that the Conclusions of Law Were Justified and that the Remedy Invoked Was a Lawful Order..... 28

Conclusion 30

TABLE OF CASES CITED

Page

National Labor Relations Board vs. Link-Belt Company, 311 U. S. 584 ..... 4, 8

National Labor Relations Board vs. Bell Oil & Gas Company, 91 Fed. (2d) 509 ..... 4, 5, 8, 25

National Labor Relations Board vs. Tex-O-Kan Flour Mill Company, 122 Fed. (2d) 433 ..... 4, 8, 28

National Labor Relations Board vs. Air Associates, Inc., 121 Fed. (2d) 586 ..... 4, 28, 30

National Labor Relations Board vs. Ford Motor Company, 305 U. S. 364 8

National Labor Relations Board vs. Jones & Laughlin Steel Company, 306 U. S. 1 24

National Labor Relations Board vs. National Motor Bearing, 106 Fed. (2d) 652 28

TABLE OF STATUTES CITED

Judicial Code, Section 240, as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926 (Title 28, Sec. 347(a) U. S. C. A.) 3, 7

National Labor Relations Act, Section 2, Subdivisions (6), (7), Section 8(1), (2), (3) and (5), 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151 et seq., and Section 10 2

IN THE

Supreme Court of the United States

October Term, 1942

No.....

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners and Respondents Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Hon. Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

On December 28, 1939, Metal Polishers, Buffers, Platers & Helpers International Union (hereinafter called Union), affiliated with The American Federation of Labor, filed its Third Amended Charges with National Labor Relations Board. (Record, p. 20.) On December 29, 1939,

the Board issued its complaint against The Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation (hereinafter called petitioners) charging petitioners with unfair labor practices affecting commerce within the meaning of Section 8, (1), (2), (3) and (5) and Section 2, (6) and (7) of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Supp. V., Sec. 151 *et seq.* (hereinafter called "Act"). (Record, pp. 24 to 38, Board's Exhibit No. 1.) Thereafter, petitioners filed their separate answers (Gerity-Whitaker Company's answer, Record, p. 40—Ex. 8). (Answer of Gerity-Adrian, Ex. 9—Record, p. 48.) In each answer, these petitioners admitted certain allegations of the complaint, but each specifically denied every charge of violation of the Act. Proceedings were then had pursuant to Section 10 of the Act. The Board's decision, containing its findings of fact, conclusions of law and order was filed on July 14, 1941. (Record, pp. 114 to 157.) The separate applications of the petitioners to vacate, rescind and set aside or modify such findings of fact, conclusions of law and order were denied August 21, 1941. Prior thereto, on November 4, 1940, The Gerity-Whitaker Company had filed its application for leave to adduce additional evidence (Record, pp. 102-112), which application was denied on November 28, 1940 (Record, pp. 113-114).

In the final decision and order, the Board directed these petitioners to cease and desist from refusing to bargain collectively with the Union, to take affirmative action, including a direction to bargain collectively with said Union and to offer reinstatement to former positions and to compensate, with back pay, thirty-one persons named in its order.

Upon non-compliance by petitioners with said order of the Board of July 14, 1941, the Board on December 26, 1941, filed in the United States Circuit Court of Appeals for the Sixth Circuit its petition, setting forth certain proceed-

ings had before the Board "In the Matter of Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation and Metal Polishers, Buffers, Platers and Helpers International Union, affiliated with The American Federation of Labor—and—Independent Finishers and Platers Union, party to the contract, and National Association of Die Casting Workers, Local No. 26, affiliated with the Congress of Industrial Organizations, party to the contract, as Case No. C-1683," setting forth certain findings of fact, conclusions of law, and a certain order made by said Board in said proceedings on July 14, 1941, and praying for an order of said United States Circuit Court of Appeals for the Sixth Circuit, for the enforcement of said order. (Record, pp. 1-8.) Under date of May 5, 1942, this cause was submitted to said United States Circuit Court of Appeals for the Sixth Circuit upon said petition filed, upon briefs of counsel for the several parties, upon the record as designated and oral arguments of counsel for the Board and these petitioners.

Under date of June 1, 1942, said United States Circuit Court of Appeals for the Sixth Circuit entered an order finding that the petition for enforcement of the Board's order should, in substance, be granted. (Record p. 583).

Thereafter petitioners filed in said court their petition for rehearing of said cause (Record pp. 585-598), which petition was thereafter denied on October 6, 1942.

II.

THE BASIS FOR THE JURISDICTION OF THIS COURT TO REVIEW THE DECREE IN QUESTION

1. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240, as last amended by the Act of Congress approved June 7, 1934, C. 426, 48 Stat. 926 (Title 28, Sec. 347(a) U. S. C. A.).

2. The cases believed to sustain the jurisdiction of this court are as follows:

National Labor Relations Board vs. Link-Belt Co., 311 U. S. 584; *National Labor Relations Board vs. Bell Oil & Gas Co.* (5th Circuit) 91 Fed. (2d) 509; *National Labor Relations Board vs. Tex-O-Kan Flour Mill Co.*, 122 Fed. (2d) 433 and *National Labor Relations Board vs. Air Associates, Inc.*, 121 Fed. (2d) 586.

III.

QUESTIONS PRESENTED

The following questions are presented for the consideration of this court:

1. Whether the finding of the Board, affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, that petitioners established a so-called "runaway shop" or branch plant and that Gerity-Adrian Manufacturing Corporation of Adrian, Michigan, is the agent and "alter ego" of The Gerity-Whitaker Company of Toledo, Ohio, is supported by substantial evidence.

2. Whether the finding and order of the Board that the petitioners reemploy Arthur Clark and Roy Keeling and twenty-nine other persons named in Appendix "A" (Record p. 156) is supported by substantial evidence and is a lawful remedy, properly justified by the findings of the Board and the undisputed evidence.

3. Whether upon the findings of the Board and the undisputed evidence, the order of the Board directing reinstatement of thirty-one designated persons was not an unlawful order and that such remedy is without legal authority and justification.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The various findings of fact, conclusions of law and order of the Board, in the particulars herein specified, under "Questions Presented," affirmed by the United States Circuit Court of Appeals for the Sixth Circuit, in its decree of June 1, 1942, are not sustained by substantial evidence, are contrary to law and involve questions of general importance and public interest.

2. The finding and order of the Board and of the United States Circuit Court of Appeals for the Sixth Circuit, with regard to the remedy or penalty invoked in directing reinstatement with back pay to thirty-one designated persons is an unlawful order and its enforcement is in conflict with the principle approved in *National Relations Board vs. Bell Oil & Gas Co.*, 91 Fed. (2d) 509, in that said order and remedy is not a proper application of the Act and of the law to the facts of the case.

Wherefore, your petitioners pray that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in case No. 9149 on the Docket of said court, titled: "*National Labor Relations Board, Petitioner, vs. The Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation, Respondents,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment, order and decree

rendered herein by said United States Circuit Court of Appeals for the Sixth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

MILO J. WARNER,

HALL & DEVLIN,
Counsel for Petitioners.

Dated December 23, 1942.

IN THE

Supreme Court of the United States

October Term, 1942

No.....

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners and Respondents Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

No opinion was rendered in the court below in connection with its order of June 1, 1942, nor in connection with its order overruling petitioners' application for rehearing on October 6, 1942.

II.

JURISDICTION

1. The date of the order to be reviewed is October 6, 1942. (Record, p. 599.)

2. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240, as last amended by Act of Congress approved June 7, 1934, C. 426, 48 Stat. 926 (Title 28, Sec. 347(a) U. S. C. A.).

3. The cases believed to sustain the jurisdiction of this court are as follows:

National Labor Relations Board vs. Link-Belt Co., 311 U. S. 584; *National Labor Relations Board vs. Ford Motor Company*, 305 U. S. 364; *National Labor Relations Board vs. Bell Oil & Gas Co.*, (C. C. A. 5th) 91 Fed. (2d) 509; *National Labor Relations Board vs. Tex-O-Kan Flour Mill*, 122 Fed. (2d) 433.

III.

STATEMENT OF THE CASE

The original parties to this proceeding are Metal Polishers International Union and the petitioners, The Gerity-Whitaker Company of Toledo, Ohio, and Gerity-Adrian Manufacturing Corporation of Adrian, Michigan. The Town of Adrian, Michigan, is located about thirty-seven miles northwest of the City of Toledo, Ohio. The Gerity-Whitaker Company was chartered in 1921, under Ohio law, as The Gerity-Whitaker-Nagle Company with an authorized capital stock of $25,000. Gerity-Adrian Manufacturing Corporation was chartered in March, 1937, as a Michigan corporation and had an issued capital stock of $10,000. The Gerity-Whitaker Company for the past fifteen years has been owned and controlled by James J. Gerity of Toledo. Gerity-Adrian Manufacturing Corporation has been continuously and solely owned by James Gerity, Jr., of Adrian, Michigan. James J. Gerity is the father of James Gerity, Jr. The father is about seventy-three years of age and the son is about thirty-eight years of age.

The Gerity-Whitaker Company was the outgrowth of a partnership of three metal polishers, James J. Gerity, William Whitaker and James E. Nagle. Nagle left the company about seven years after incorporation and established his own business in Toledo. Whitaker left the com-

pany about eight years after its incorporation and likewise set up his own business and both former partners thereafter competed with The Gerity-Whitaker Company. (Record, p. 378.) These facts are pertinent and material as will subsequently appear.

About 1927 or 1928, James Gerity, Jr., began to take an active part in his father's business. By 1934 James Gerity, Jr., had developed some production business with automobile manufacturers in Michigan. During the last four or five years, Gerity, Jr., was associated with his father in The Gerity-Whitaker Company, serious disagreements developed as to the fundamental policy to be maintained in the type of work or production the company would handle. Gerity, Sr., contended that the business should be directed to and specialize in job plating. This work consists principally of replating silver, bronze and copper articles from which the original finish was cracked, chipped or rusted. It also included a small amount of new plating for local industries, but such work was never large in the value of any single order or contract.

Gerity, Jr., insisted upon transforming the business of The Gerity-Whitaker Company into production work. He believed that the company should purchase the raw metal castings for plating and resell the finished casting to manufacturers. He developed a business for small metal articles in the automobile trade such as hub caps, radiator ornaments, the metal part of the steering wheel, etc. Sales of such articles would be in quantities running to 20,000 or 30,000 or more. This type of business was not steady and regular, but seasonal and competitive. Gerity, Sr., opposed the transformation of his business into production work because it represented an altogether different line of work than that he had produced during the thirty years or more prior to the change. By its very nature, production work required temporary hiring of extra employees over the

periods of major activity in the automobile business. After the company produced 20,000 or 30,000 parts it might have on order, then employment would be reduced from perhaps one hundred employees to twenty-five to thirty-five. During the periods of maximum production, the responsibility for the completion and delivery of orders rested upon James J. Gerity, a man then approaching seventy years of age. The strain and responsibility was more than he felt he could endure and as a consequence he repeatedly warned and threatened his son, James Gerity, Jr., that he would quit the production business and refuse to handle it longer.

As a matter of fact, The Gerity-Whitaker Company substantially reduced its production work in the latter part of 1937. Since 1938, The Gerity-Whitaker Company has operated a job plating shop rather than a production plating shop. It is true that the volume of business transacted in recent years and the number of employees hired is greatly less than during the years preceding 1937. However, the work handled is job plating and being of smaller volume does not require the employment of a great number of platers and polishers. (Record, pp. 388-454 to 457.)

In the face of the threats of Gerity, Sr., to discontinue the operation of a production shop, Gerity, Jr., in March, 1936, rented a small garage in the Village of Blissfield, Michigan, at a monthly rental of Twenty-five Dollars and decided to set up his own business in that location. At the same time he advised his father that he was getting out to run his own business and requested that The Gerity-Whitaker Company have an accounting of his 50% interest in accumulated profits. Gerity, Sr., advised his son that the company did not have the cash to make the settlement and that he did not propose to borrow the money to finance it. He offered to let his son have whatever equipment or material he might need in lieu of cash and any other help his company could provide. (Record, pp. 387-388 and 454-

455.) The books of The Gerity-Whitaker Company disclose that machinery and equipment of the net value of $1,854.28 was charged to James Gerity, Jr. (Record, p. 223.) With this machinery and equipment, Gerity, Jr., set up a small shop in Blissfield, hired four or five workmen and eventually was obliged to move out of the garage building in Blissfield to larger quarters in the City of Adrian, Michigan, due to the expansion of his business. (Record, pp. 388-391, 456.) Four years after Gerity, Jr., commenced his business with four helpers in the Village of Blissfield, he was employing more than several hundred men in his factory in Adrian. (Record, p. 118.) Since the metal plating industry is now dormant due to the discontinuance of automobile production and other priorities and restrictions, Gerity-Adrian Manufacturing Corporation has transformed its operations into new fields of production, and James Gerity, Jr., and Gerity-Adrian are now working on the production of shell casings, armor plate and other war essentials. The Gerity-Whitaker Company is still confining its operations to job plating, all of which is consistent with the declarations made by Gerity, Sr., more than seven or eight years ago.

The complaint charges that Gerity-Adrian Manufacturing Corporation was the agent and "*alter ego*" of The Gerity-Whitaker Company and that it was a branch plant or runaway shop established to circumvent a contract of Gerity-Whitaker Company with Metal Polishers Union. The evidence shows (Record, p. 457) that neither James J. Gerity nor The Gerity-Whitaker Company from March, 1936, to February, 1940 (time of hearing) had received any compensation, dividend, or payment of any consideration in any form or medium whatsoever from Gerity-Adrian Manufacturing Corporation or James Gerity, Jr.; that Gerity, Sr., had never been consulted concerning any business transacted by Gerity, Jr., in Blissfield or Adrian,

Michigan; that he had never advised or suggested the establishment of a shop in Blissfield and had never directed, dominated or in any way controlled James Gerity, Jr., or Gerity-Adrian Manufacturing Corporation after March, 1936, when Gerity, Jr., leased the garage and set up a shop in Blissfield. (Record, pp. 394 to 397-456.) It further appears that Gerity, Jr., has not managed, directed or controlled, directly or indirectly, the business, affairs or policy of The Gerity-Whitaker Company and that he received nothing from The Gerity-Whitaker Company except an adjustment of his claim for profits or salary which had accumulated prior to his separation from The Gerity-Whitaker Company or accrued on work in process and under order immediately subsequent thereto. A statement of the assets and liabilities of James Gerity, Jr., as of April 1, 1937, the date on which the books of Gerity-Adrian Manufacturing Corporation were opened, appears on page 579 of the record.

The complaint charges that The Gerity-Whitaker Company established a runaway shop or branch plant in April, 1936, for the purpose of avoiding a contract with Metal Polishers Union. At about this time, March, 1936, The Gerity-Whitaker Company was employing approximately fifty-two men weekly. In the fall of 1936, the Gerity-Whitaker Company was employing temporarily from one hundred twenty to one hundred twenty-eight men per week. It was stipulated by the parties (Record, p. 321) as follows:

> Gerity-Whitaker labor payroll in the year 1934 was $59,219;
>
> Gerity-Whitaker labor payroll in the year 1935 was $51,492;
>
> Gerity-Whitaker labor payroll in the year 1936 was $68,406;
>
> Gerity-Whitaker labor payroll in the year 1937 was $52,167.

Thus, the total for the two years preceding the establish-

ment of the so-called runaway shop was $111,000, while for the next two years the payroll was $121,000.

It is conceded by the Board (Record p. 121) that immediately prior to January 1, 1937, The Gerity-Whitaker Company was giving employment to three times the normal number of employees hired. In this connection, the Board in its findings of fact says:

> "Shortly thereafter, on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees."

The Gerity-Whitaker Company had written working agreements with Metal Polishers Union during the years 1935, 1936 and 1937. The first complaint by the Union against The Gerity-Whitaker Company was in the summer of 1936 when it was rumored that The Gerity-Whitaker Company was moving some equipment to Blissfield, Michigan. (Record, pp. 185-186-187.) Prior to the summer of 1936, there were no complaints by the Union concerning layoffs, refusal to bargain, working conditions or rates of pay. (Record, p. 406.) The business agent of the Union testified (Record, p. 185): "We had best experience with one another and cooperation."

In the summer of 1936, it was testified (Record, p. 187) that the Union officials found four polishers working in Blissfield "And we put up the proposition to him (Jim Gerity, Jr.) that the men had taken a strike vote and it looked very serious, that we considered putting this plant up into Michigan and hiring polishers and buffers for less money than what he was paying in Toledo, was detrimental to us." This statement sums up the case against these petitioners. According to Mr. Englert, business agent of the Union, James Gerity, Jr., had no right to establish or undertake to operate his own business. He was tied into

The Gerity-Whitaker Company and as long as he stayed in the metal polishing business, he could not divorce himself from that company. The fact that he might have an ambition to found and develop his own business was not permissible. The fact that he was the owner of one share of stock of The Gerity-Whitaker Company would forever make him a part of The Gerity-Whitaker Company. We think the position of the Union, as declared above, is not the law and that James Gerity, Jr., was not prohibited from an honest effort to attempt to establish and maintain his own business as time has shown was done so successfully.

We do not suggest or claim that Gerity, Sr., and Gerity, Jr., dealt at arm's length with each other in the details pertaining to the termination of their business association, or that either of them checked and audited the company's books of account or undertook to verify with deliberate care the sum of money which was owed by the company to either of them. As Gerity, Sr., frequently testified, his chief interest so far as the books were concerned was to see that the bills were paid. After all, these men were father and son. They had worked for some years as equal partners in this business. While they could not agree upon their fundamental business policy, still there was no suggestion of mistrust or suspicion, resentment or estrangement in their decision to personally own and conduct their separate enterprises.

The Gerity-Whitaker Company, an Ohio corporation, was never authorized or qualified to do business in the State of Michigan. (Record, p. 491.) If this company was actually "doing business in the State of Michigan" it could have been penalized under Michigan law by the nullification of every transaction consummated between April 1936 and March 1937.

Within three years of the time James Gerity, Jr., left The Gerity-Whitaker Company, he had developed the pro-

duction and sale of numerous articles never before manufactured or sold by The Gerity-Whitaker Company and had secured substantially more than four hundred new accounts with whom The Gerity-Whitaker Company had never transacted business. (Record, p. 408—Ex. 2, p. 565.)

IV.

SPECIFICATIONS OF ERROR

1. Said Circuit Court of Appeals erred in holding that the Board's finding that The Gerity-Whitaker Company transferred operations to Blissfield and Adrian, Michigan, to evade obligations under a contract with the Union and set up a "runaway shop" in violation of Sec. 8(5) of the Act was supported by substantial evidence.

2. Said Circuit Court of Appeals erred in holding that the Board's finding that Gerity-Adrian Manufacturing Corporation was the *"alter ego"* and agent of The Gerity-Whitaker Company and was founded and established by Gerity-Whitaker Company to interfere with, restrain and coerce its employees in violation of Section 8(1) of the Act as it is not supported by substantial evidence and its conclusion of law ordering reinstatement with back pay allowance to thirty-one designated persons is erroneous.

3. The remedy invoked by the Board upon its findings of fact and conclusions of law is an unlawful order and said Court of Appeals erred in holding that the conclusions of law were justified and lawful and that the remedy invoked was a lawful remedy either warranted by law or the provisions of the Act.

V.

ARGUMENT

Point 1. Said Circuit Court of Appeals Erred in Holding that the Board's Finding that The Gerity-Whitaker Company Transferred Operations to Blissfield and Adrian, Michigan, to Evade Obligations under a Contract with the Union and Set Up a "Runaway Shop" in Violation of Sec. 8(5) of the Act was Supported by Substantial Evidence.

The accusation in the complaint that The Gerity-Whitaker Company transferred business operations from Toledo into the State of Michigan to avoid its contract with the Union is the keystone of the case. If the Board has failed to prove by substantial evidence that the petitioners established and set up a runaway shop to avoid its contract, then the other charges of the complaint are without a base or foundation. The particulars of this specific charge are set forth in paragraph 12 of the complaint, as follows:

> "On or about March, 1936, respondent, Gerity-Whitaker, intending to establish a branch plant at the Village of Blissfield, Michigan, and desiring to engage new employees and at lower rates of pay than prevailing at its Toledo plant by virtue of the aforesaid agreement with the Metal Polishers, sought from the Metal Polishers an agreement to refrain from organizing or soliciting the membership of the employees to be engaged at Blissfield, and upon its representation that the operations to be conducted at Blissfield would not result in any diminution of employment at the Toledo plant and would be confined solely to manufacture for certain specified purposes, obtained such agreement from the Metal Polishers and said respondent did thereafter establish and operate such branch plant at Blissfield until January, 1937."

The complaint then proceeds to charge that the alleged solicitation of the Union not to organize employees at Bliss-

field was unlawful and a violation of Section 7 of the Act and an infraction of Section 8(1) of the Act. It should be noted that it is charged that Gerity-Whitaker Company sought the agreement preliminary to setting up and opening a shop in Blissfield; that before it did so, it secured a promise from the Union that the men to be hired in Blissfield would not be organized. No attempt was ever made by the Board or the Union to prove the allegation of this paragraph of the complaint. However, it was felt essential to incorporate the charge in the complaint in order to have it appear that James Gerity, Jr., had recognized the Union's right to jurisdiction over the territory in which Blissfield and Adrian, Michigan, are located.

Of course the evidence shows that The Gerity-Whitaker Company, as a company, knew nothing about the plan of James Gerity, Jr., to rent a garage and hire five or six men to work for him in Blissfield until after the business was commenced. Furthermore, the first objection or issue or complaint concerning this so-called "runaway shop," in the words of George Englert, business agent of the Union, who testified with the aid of records, "First complaint was during the summer of 1936" when he talked about it to James Gerity, Jr. (Record, p. 187.)

Therefore, the fact is clearly shown that there was no understanding or agreement between the Gerity-Whitaker Company and the Union with reference to employment at Blissfield or as to limitation of employment or guarantee of no decrease of employment in Toledo because Gerity-Whitaker Company (James J. Gerity) knew nothing of Blissfield until after the shop had been opened and the Union never met with James J. Gerity concerning Blissfield and did not meet with the owner of the shop, James Gerity, Jr., until not less than four or five months after the business had been in operation. Thus, the initial attempt to connect The Gerity-Whitaker Company with the

so-called "runaway shop" utterly fails of proof and the Board's evidence in this respect clearly disproves the pertinent allegations of the complaint and confirms the testimony of James J. Gerity and James Gerity, Jr., that there was no understanding, plan or scheme discussed, arranged or devised to establish the Blissfield shop. It further appears beyond all reasonable doubt that the Blissfield shop was wholly conceived, planned and executed by James Gerity, Jr., after he became convinced that James J. Gerity had definitely decided to discontinue the operation of a production shop.

The evidence is uncontroverted that during the years 1934, 1935, 1936 and 1937, written working agreements between petitioners and the Union were in effect. The business agent of the Union testified (Record, p. 185): "We had best experience with one another and cooperation." The first complaint by the Union against The Gerity-Whitaker Company was in the summer of 1936, when it was rumored that Gerity, Jr., was moving some equipment to Blissfield. (Record, pp. 185, 186, 187.) This shop in Blissfield constituted the entire complaint of the Union against The Gerity-Whitaker Company. There were no charges, prior to the summer of 1936, concerning layoffs, working conditions, rates of pay or refusal to bargain. It was testified that in the summer of 1936, Union officials found four polishers working in Blissfield, "And we put up the proposition to him (James Gerity, Jr.) that the men had taken a strike vote and it looked very serious, that we considered putting this plant up into Michigan and hiring polishers and buffers for less money than what he was paying in Toledo, was detrimental to us."

If James Gerity, Jr., was actually trying to establish his own business in Blissfield in 1936, then the threats of the Union were unlawful and coercive. Possibly Gerity may have tried to induce the Union in the latter part of

1936 and during 1937 to refrain from calling a strike at The Gerity-Whitaker Company. This was a natural desire on his part not to have James J. Gerity (Gerity-Whitaker Company) penalized by labor trouble in consequence of his attempt to operate his Blissfield shop. Possibly he might have indicated that his Blissfield shop would not reduce the volume of employment by The Gerity-Whitaker Company. According to the stipulated evidence and the Board's findings of fact (Record, p. 121), The Gerity-Whitaker Company was giving employment in the last four months of 1936 "To three times its normal complement of thirty to forty employees."

These comments on the evidence negative the charge of the establishment of a branch plant or runaway shop. They prove that the evidence does not sustain the acts charged against the petitioners in the complaint. This evidence establishes that there was no labor difficulty to escape by the transfer of operations to another locality and the record shows by stipulated original records that instead of employment being decreased in 1936, the number of workers employed and the amount expended for payroll was greater than for some years in the business of The Gerity-Whitaker Company.

In its answer to the complaint (Record, pp. 44, 45, 46), The Gerity-Whitaker Company sets forth the facts giving rise to the severance of business relations between The Gerity-Whitaker Company and James Gerity, Jr., or as between father and son. The answer declares that the only reasons for the establishment of a business in Michigan by James Gerity, Jr., was a basic dispute as to business policy, *i.e.*, whether The Gerity-Whitaker Company should continue to operate as a production plating shop. Further, it appears that James J. Gerity refused to divide the capital stock with his son and that he had warned his son that

he would discontinue the operation of a production shop on account of the mental and physical strain to himself as he was charged with responsibility for production. He further objected to risking the capital involved in such production business and insisted that it was his personal desire, at his advanced age, to confine his business to that of a job plating shop.

As against the arguments and reasons of the father for desiring to limit and decrease the volume of business, Gerity, Jr., desired to eliminate the handling by The Gerity-Whitaker Company of job plating and to solely devote operations to production work. The evidence showed beyond controversy that while Gerity, Jr., desired to manage and direct the business, his father continued to dominate and insisted upon his own policies; that the father would not divide the capital stock; that he vetoed plans and changes either proposed or initiated by his son; that the father discharged technical experts, an accountant and chemist, insisting he could not stand the expense; that he opposed the investment of money and new and more efficient equipment; that he persistently threatened to reject production orders obtained by Gerity, Jr., and frequently warned and invited his son to leave The Gerity-Whitaker Company and operate his own business. (Record, pp. 232-386 to 391-407-445 to 454.) In consequence, Gerity, Jr., had no alternative than to undertake to operate on his own responsibility, but as he testified (Record, p. 469): "I never discussed nor thought of it even." (Transfer of the business of The Gerity-Whitaker Company from Toledo to another location to escape contract with Union.)

Thus it appears from the undisputed evidence that there were no underlying conditions in the affairs of The Gerity-Whitaker Company and in its labor relations during the year 1936 to prompt or cause it to establish a branch

plant or runaway shop. On the contrary, the establishment of a branch plant with consequent division of authority, added financial risk and opportunity for James Gerity, Jr., to expend his father's money, establish a production shop and put into effect his personal ideas as to business policy were the very things James J. Gerity most violently opposed and resisted.

In the history of labor controversies involving the establishment of runaway shops or branch plants, the termination of operations in the original location and the resumption of operations in a new location, the facts invariably disclose that labor controversies exist with lockouts, strikes and other difficulties in progress. Under such circumstances, employers have endeavored to circumvent collective bargaining by the transfer of operations to a new location and have shut down their business and operations in the home plant.

Here, there was no dispute or labor trouble,—no cessation or diminution of employment. The only controversy was between the owners or operators of The Gerity-Whitaker Company and this issue alone prompted the opening of a small shop in Blissfield by James Gerity, Jr. For the ten months immediately following the establishment of the Blissfield shop, the record shows that The Gerity-Whitaker Company employed more men and had a larger payroll than during the preceding two years; that for approximately three months in 1936, it employed more than twice its average number of employees; that during the entire year of 1937 its total payroll and employment was only 10% less than the average employment and payroll for the years 1934 to 1937, inclusive; that for a period of twenty-two months, beginning with March, 1936, the employment and payroll of Gerity-Whitaker Company was greater than at any time in the company's history. (Record, p. 321.)

Point 2. The Finding of the Board that Gerity-Adrian Manufacturing Corporation was the "Alter Ego" and Agent of The Gerity-Whitaker Company and was Founded by The Gerity-Whitaker Company to Interfere With, Restrain and Coerce Its Employees in Violation of Section 8(1) of the Act is not Supported by Substantial Evidence and its Conclusion of Law and Order for Reinstatement with Back Pay Allowances to Thirty-One Designated Persons is Erroneous.

This point raises the question as to whether or not The Gerity-Whitaker Company or James J. Gerity, its owner, are or were since March, 1936, beneficially interested in Gerity-Adrian Manufacturing Corporation and whether or not they managed, promoted, dominated or directed the business and affairs of Gerity-Adrian. The undisputed evidence (Record, pp. 395 to 397) shows that James J. Gerity owns no stock and has no interest in Gerity-Adrian and has never received any consideration from it by way of salary, commission, dividend or otherwise; that Gerity, Jr., subscribed the entire capital stock of Gerity-Adrian and has continuously and solely owned the same; that while Gerity, Jr., made his father a director of his company, it was merely a mark of respect of son for father; that Gerity, Sr., was not consulted about the matter, was not present when appointed, never attended a meeting of Gerity-Adrian, never conferred with his son as to any act, decision or policy of Gerity-Adrian or as to operations in Michigan (Record, pp. 395 and 423); that when Gerity, Jr., in the year 1940 decided to construct a substantial factory in the City of Adrian and borrow a considerable sum of money to finance the construction, his father knew nothing concerning the proposed factory or its financing until after the building was under construction and the loan had been made. (Record, p. 458.)

No representative of the Board has ever claimed, in

argument or otherwise, that James J. Gerity or The Gerity-Whitaker Company had any interest in, control over or participated in the creation, management and operation of Gerity-Adrian, or shared in any profits, losses or income of that company. In commenting on this phase of the case, the Trial Examiner finds (Record, p. 61): "It is undisputed that Gerity, Sr., had little, if anything, to say about the business."

It has been charged and concluded by the Board that The Gerity-Whitaker Company transferred machinery and equipment into Michigan to establish a branch plant. The record shows that while The Gerity-Whitaker Company sold a small amount of machinery and equipment to James Gerity, Jr., and charged him with the depreciated value of such property, James Gerity, Jr., and Gerity-Adrian had an investment in machinery and equipment in March, 1937, of $13,750.00. (Record, p. 579.) Of this total approximately $1,800.00 of such machinery and equipment was obtained from The Gerity-Whitaker Company, as aforesaid. (Record, p. 126.) Eighty-five per cent of such machinery and equipment was purchased and paid for by James Gerity, Jr., upon his own credit and responsibility. The Board itself in its findings of fact declares: "The record also reveals that only about one-tenth of the machinery used by Gerity-Adrian was obtained from the Toledo plant." (Record, p. 126.) Thus, with the record clearly showing that neither The Gerity-Whitaker Company nor James J. Gerity participated in the establishment, management and maintenance of Gerity-Adrian, the evidence further disclosing that neither The Gerity-Whitaker Company nor James J. Gerity ever participated in the income through salary, dividends or otherwise, and it being shown by the Board's conclusion of fact that the machinery and equipment secured by James Gerity, Jr., from The Gerity-Whitaker Company was only about 10% of his investment in such property, then the conclusion that Gerity-

Adrian Manufacturing Corporation was the *"alter ego"* of The Gerity-Whitaker Company clearly appears to be an unfounded and groundless finding of fact and an erroneous conclusion of law.

If Gerity-Adrian Manufacturing Corporation was not a branch plant and the *"alter ego"* of The Gerity-Whitaker Company, then, James Gerity, Jr., had the lawful right to exercise his discretion in the employment of workmen to operate his business in the State of Michigan. In the case of *National Labor Relations Board vs. Jones & Laughlin Steel Company,* 306 U. S., p. 1, this court declared on pages 45 and 46 of the opinion:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

In the face of the undisputed testimony that no labor disagreement, controversy, refusal to bargain or maintain existing working agreement obtained in March, 1936,—in the light of the undisputed testimony that the only disagreement or dispute existing at that time was between the Geritys and that their differences constituted the true reason for Gerity, Jr., establishing a shop in Michigan, the conclusion inevitably follows that the Board's declaration and decree that Gerity-Adrian was the agent and *alter ego* of Gerity-Whitaker and that Gerity-Whitaker directed its establishment and dominated its operation is an unlawful finding of fact and conclusion of law.

The uncontroverted evidence shows that Gerity, Jr., within three years, developed a far greater volume of trade with diversified products than Gerity, Sr., had created in

more than thirty years' experience in the same general type of business. It further appears that Gerity, Jr., obtained more than four hundred accounts with whom The Gerity-Whitaker Company had never transacted any business. (Record, p. 408.)

In the case of *National Labor Relations Board vs. Bell Oil & Gas Company,* 91 Fed. (2d) 509, the Court of Appeals for the Fifth Circuit, on page 513 of the opinion declares:

> "If the facts found by the Board support its order, and the evidence supports the finding, and if the order is within the scope of the regulatory provisions of the Act, the court will enforce it. If otherwise, it will not do so."
>
> "5. It is thus seen that the function of the courts in the operation of the Act is by no means perfunctory. Upon them rests the final responsibility, from them emanates the sole authority, for making the Board's orders coercively effective. Upon them is conferred the jurisdiction, upon them rests the solemn duty to judicially determine finally and for themselves the remedial decree that shall be entered. It is for them to say whether the order the Board has entered will be enforced, or modified and enforced, or set aside in whole or in part. It is only as to the fact findings, when they are supported by the evidence, that the action of the Board is binding upon the courts. On a petition to enforce, it is therefore the duty of the court to determine, in the exercise of an informed judicial discretion, whether, in the light of the Board's findings if they are sustained by the evidence, its order shall be enforced, modified or set aside. * * * It is its duty to decline to enforce it, if in the opinion of the court it is not supported by the law and the facts."

With the foregoing principles of law in mind, we wish to refer briefly to the conclusion of law directing reinstatement with back pay of thirty-one designated persons and the Board's order in consequence of such legal conclusion.

The complaint charges (Record, p. 30, par. 23) that thirty employees were laid off or discharged by The Gerity-Whitaker Company because of a transfer of opera-

tions from Toledo to Michigan. Petitioners deny this charge and answer that seventeen of such employees were hired at least six months after the alleged transfer of operations; that their discharge or layoff had no connection with or relation to the so-called transfer of operations; that if The Gerity-Whitaker Company's business had been transferred, as alleged, the seventeen employees would never have been hired by The Gerity-Whitaker Company. (Record, pp. 465-466.) We quote from the findings of fact of the Board (Record, p. 121) as follows: "Shortly thereafter, on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees." Now the doubling and tripling of employment by The Gerity-Whitaker Company in September, October and November of 1936 was wholly inconsistent with the charge that in March of 1936, it removed operations out of Toledo and into Michigan to escape and circumvent its contract with the Union. As a matter of fact, the Union sent to The Gerity-Whitaker Company during the latter months of 1936 the more than seventy extra employees temporarily hired by Gerity-Whitaker to produce and fill a large order in excess of the normal production capacity of the employees regularly in its employ. These men usually worked in other Toledo plating plants and seized the opportunity to find temporary employment with The Gerity-Whitaker Company when their own employers had no work for them. Among the seventy or more workmen hired for temporary work by The Gerity-Whitaker Company the last four months of 1936, seventeen persons are included among the thirty who now seek reinstatement with back pay from January, 1937, on the theory that the transfer of operations by Gerity-Whitaker Company to Michigan in March, 1936, conferred the right to obtain reinstatement to a temporary job, with back pay for a matter of three to five years.

We quoted from the Board's findings that The Gerity-Whitaker Company normally employed thirty to forty workmen. By reference to Exhibit 41 (Record, pp. 560-561) we find that from January to December 24, 1937, The Gerity-Whitaker Company employed less than thirty men during only six weeks of that year; that during twenty-three weeks more than forty employees were on its payroll. Thus, it appears that for practically two years after the alleged establishment of a runaway shop, The Gerity-Whitaker Company continued to employ "its normal complement of thirty to forty workmen." Exhibit 40 further shows that of the thirty employees named in the complaint, but thirteen had been employed by The Gerity-Whitaker Company before October, 1936. There is no dispute as to the fact that The Gerity-Whitaker Company, after September, 1936, hired seventeen of the persons who joined in the complaint. Admittedly, they were not hired because of a transfer of operations to Michigan nor were they hired because the volume of production had been decreased. The only rational conclusion from the undisputed evidence is that they secured employment with Gerity-Whitaker, temporary or continuing, not because of an alleged transfer of operations into Michigan, but for reasons wholly inconsistent and directly opposed to every claim and contention of the Board since the beginning of this proceeding. Thus, the facts are in absolute conflict with the application of the law and the remedy invoked against the respondents. No justification or legal authority for the inclusion in the order or remedy of reinstatement and back pay allowances to these persons has been suggested by the Board or by the court.

However, in an effort to justify the reinstatement order with back pay allowances, the Board stated (Record, p. 128): "While these sixteen employees were not employed until four or five months after the Blissfield shop had been opened, they were all in its employ before and

after the Adrian plant had been founded." By reference to Exhibit 40 (Record, p. 557), the inexcusable error of the Board in the alleged justification for its order appears. Two of the persons ordered reinstated were not employed until September, 1937, and six or more temporary employees had been laid off about January 1, 1937.

Point 3. The Remedy Invoked by the Board Upon its Findings of Fact and Conclusions of Law is an Unlawful Order and the Court of Appeals Erred in Holding that the Conclusions of Law were Justified and that the Remedy Invoked was a Lawful Order.

It has been recognized that orders for reinstatement of employees with back pay differ from other orders which the Board may properly make under the Act as to the degree of proof necessary to sustain such reinstatement and back pay orders. *National Labor Relations Board vs. Tex-O-Kan Flour Mill Company,* 122 Fed. (2d) 433. This distinction is based upon the fact that such back pay orders "May impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law." It has likewise been held that there must be substantial evidence not only that the purpose of the discharge was to discriminate against Union membership, but also that the unlawful purpose of discrimination had the desired effect, *viz.*: The discouragement of Union membership. *National Labor Relations Board vs. Air Associates, Inc.,* 121 Fed. (2d) 586.

In the case of *National Labor Relations Board vs. National Motor Bearing,* 106 Fed. (2d) 652, the court held:

> "A Board order directing reinstatement of employees will be understood by the court as meaning only those who are such within the Act's definition."

In the Act, Section 2(3), an employee is defined:

> "The term 'employee' * * * shall include any individual whose work has ceased as a consequence of,

> or in connection with any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

It was shown that no labor dispute or controversy existed; that no discrimination or discharge was ever made by The Gerity-Whitaker Company by reason of Union membership in its business. It was further shown that the seventy or eighty employees hired for temporary work in the fall of 1936 were hired for temporary employment to handle an unusual volume of work in excess of the capacity of the employees regularly hired by Gerity-Whitaker. The employees hired were members of and sent to the company by the Union. If the law is applied to the facts, can it be said that these temporary employees, whose term of employment lasted periods of from thirty to ninety days, were laid off in consequence of a current labor dispute or because of an unfair labor practice? Clearly, the normal number of employees, thirty to forty, had first claim, by reason of seniority, to employment with The Gerity-Whitaker Company. Yet, seventeen of the temporary employees are joined as complainants against the petitioner. If all temporary employees were joined in the complaint, then The Gerity-Whitaker Company, on the basis of the Board's order, could be required to reinstate two to three times its normal complement of employees and compensate them for back pay from the date their temporary employment ended on or about January 1, 1937.

It is thus seen that the Board's order is not based upon proof of a decrease in employment due to the establishment of an alleged runaway shop. It further appears that no labor controversy existed at the time James Gerity, Jr., opened a plating shop with four employees in the Village of Blissfield and that no argument arose until four months after this event had occurred; that the proof of the branch plant is without foundation as there is no evidence even

tending to show that James J. Gerity or The Gerity-Whitaker Company has any investment, interest, control or dominion over Gerity-Adrian Manufacturing Corporation. It further appears that the greater number of the complainants are workmen who secured temporary employment despite the charge that operations were transferred into another state and that the order of the Board and the remedy invoked, if carried out and applied to all temporary employees, would obligate the employer to rehire three times its normal number of workmen and compensate with back pay on the same percentage basis.

CONCLUSION

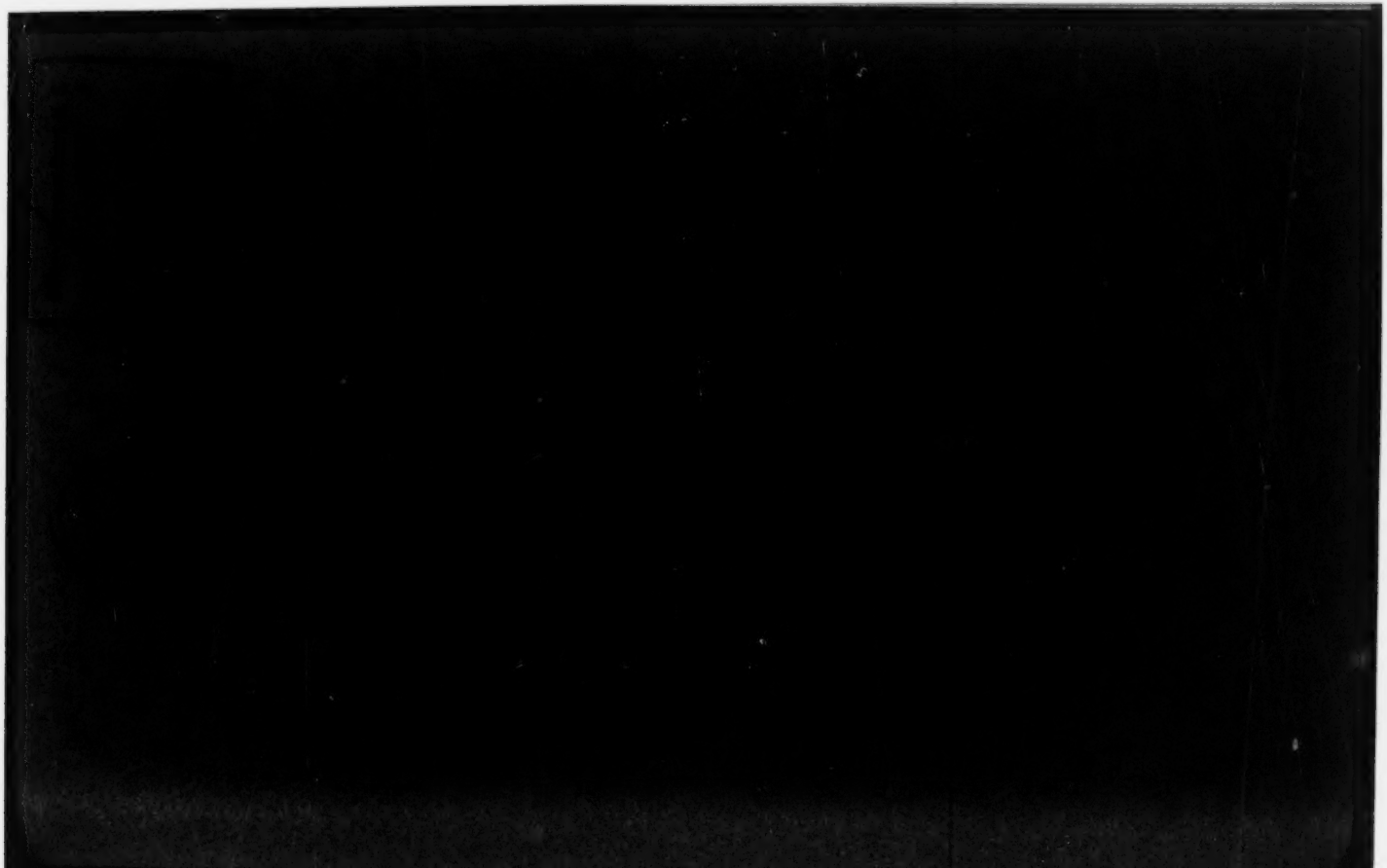
It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of *certiorari* and thereafter reversing the decision herein of the Sixth Circuit Court of Appeals in that said court and the Board have not given proper effect to the law and applicable decisions of this court; in that the findings of the Board, its order and the order of said court are not sustained by substantial evidence; in that the questions involved are of general importance and that the order of reinstatement with back pay is in conflict with the particular conditions and principles limiting the application of such remedy, and is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board vs. Air Associates, Inc.*, 121 Fed. (2d) 586.

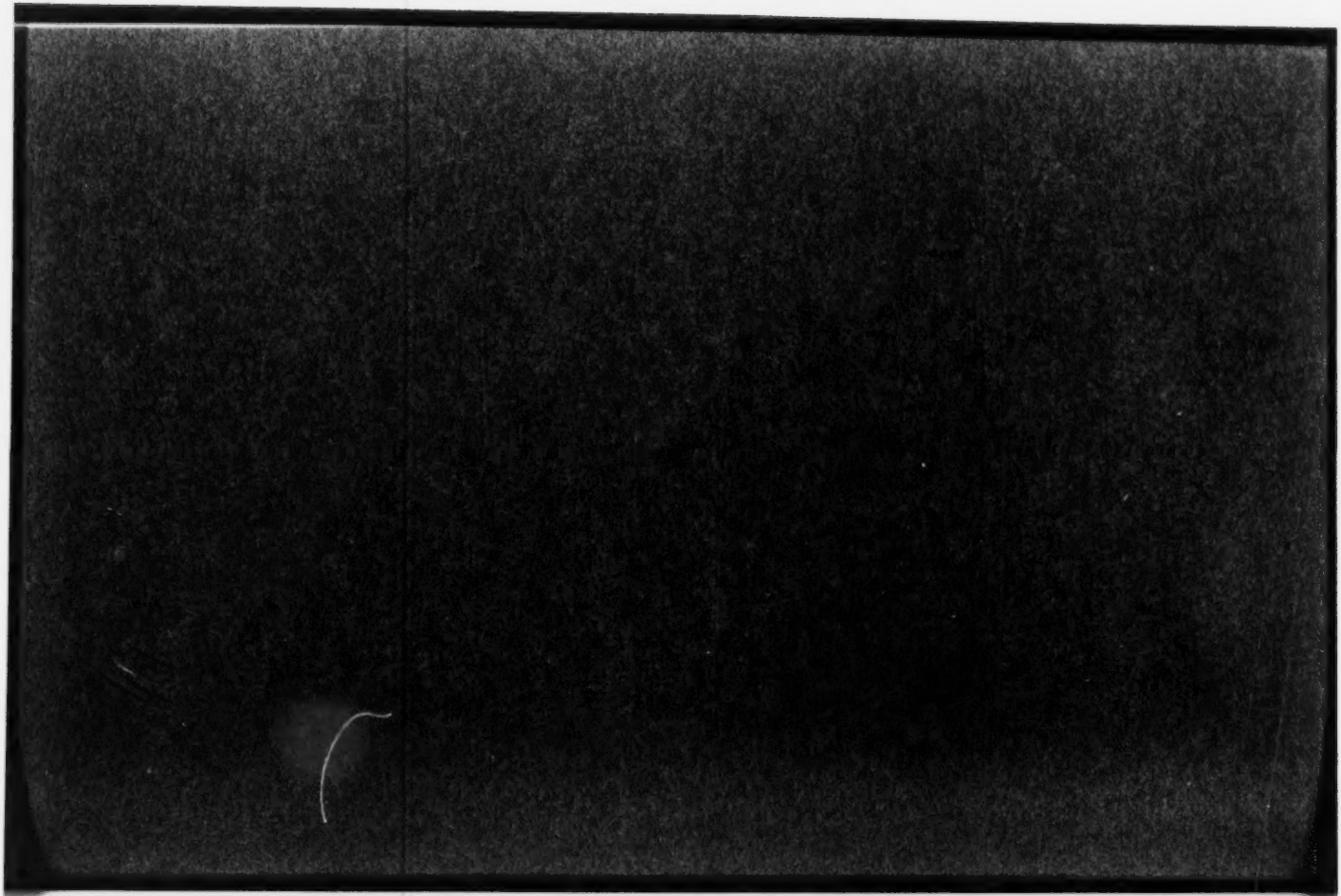
Respectfully submitted,

MILO J. WARNER,

HALL & DEVLIN,

Counsel for Petitioners.





INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	15
Conclusion	19
Appendix	20

CITATIONS

Cases:	
Associated Press v. *National Labor Relations Board*, 301 U. S. 103	18
National Labor Relations Board v. *Air Associates, Inc.*, 121 F. (2d) 586	16, 17
National Labor Relations Board v. *Cities Service Oil Co.*, 129 F. (2d) 933	17
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584	18
National Labor Relations Board v. *Virginia Electric & Power Co.*, decided December 9, 1942	14
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177	18, 19
Stonewall Cotton Mills, Inc. v. *National Labor Relations Board*, 129 F. (2d) 629 and 129 F. (2d) 633, certiorari denied, October 19, 1942, No. 346, present Term	17
Statutes:	
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*):	
Sec. 2 (3)	20
Sec. 7	20
Sec. 8 (1)	20
Sec. 8 (2)	20
Sec. 8 (3)	21
Sec. 8 (5)	21
Sec. 9 (a)	21
Sec. 10 (c)	22
Miscellaneous:	
H. Rep. No. 1147, 74th Cong., 1st sess., p. 19	18
S. Rep. No. 573, 74th Cong., 1st sess., p. 11	18

508841—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 583) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 114–157) are reported in 33 N. L. R. B. 393.

JURISDICTION

The decree of the circuit court of appeals (R. 583) was entered on June 1, 1942. A petition for rehearing filed by petitioners (R. 585–598) was

denied on October 6, 1942 (R. 599). The petition for a writ of certiorari was filed on January 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the findings of the Board, sustained by the court below, that:

(a) Apart from business considerations, a substantial cause for the establishment of co-petitioner Gerity-Adrian Manufacturing Corporation by petitioner Gerity-Whitaker Company was the latter's plan to evade its duties under the Act, thereby interfering with, restraining, and coercing its employees in violation of Section 8 (1) of the Act.

(b) Petitioner Gerity-Whitaker Company refused to bargain collectively in violation of Section 8 (1) and (5) of the Act.

(c) Petitioners Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation discriminated in regard to hire and tenure of 31 employees in violation of Section 8 (1) and (3) of the Act.

2. Whether that portion of the Board's order which requires petitioners to offer reinstatement

with back pay to the 31 employees against whom petitioners discriminated is valid and proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 20–22.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 114–157). The facts as found by the Board and shown by the evidence may be summarized as follows:[1]

Petitioner Gerity-Whitaker Company, an Ohio corporation, engaged at Toledo, Ohio, in the business of electroplating and metal finishing, was operated as a non-union shop by James Gerity, Sr., and his son James Gerity, Jr. (herein called Gerity Senior and Gerity Junior, respectively), until October 21, 1935, when it signed a contract with the Metal Polishers,[2] which a majority of its employees had joined (R. 118–120, 129; 182–183, Bd. Exh. 18). In March 1936 it signed a new contract with the Metal Polishers, increasing wages for its journeymen (R. 120; 183,

[1] In the following statement the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] Metal Polishers, Buffers, Platers & Helpers International Union, affiliated with the American Federation of Labor (R. 114–115).

Bd. Exh. 19). About a month later a small plant at Blissfield, Michigan, was established under the supervision of Gerity Junior, then president of the Gerity-Whitaker Company and in charge of its labor relations (R. 119–120; 187, 216, 228, 388–389, 508–509). To operate this plant several non-union employees were hired at rates of pay lower than those prevailing at the Toledo plant (R. 120–121; 187, 314, 528).

Part of the machinery at the Toledo plant was moved to the Blissfield plant; both plants operated under the same name; both used the same stationery and slogan and the same bookkeeper, auditor, and chemist; supplies were purchased, quotations on work were made, payment was received, and the bank account was carried, in the name of the Gerity-Whitaker Company (R. 120; 234, 323, 388–390, 412–414, 423, 454, 468–469, 506–507).

When the members of the Metal Polishers learned of the establishment of the branch at Blissfield and saw machinery being moved out of the Toledo plant, they voted to call a strike in protest (R. 121; 185–187). Representatives of the Metal Polishers met with Gerity Junior and accused him of hiring non-union employees at rates of pay contrary to the terms and conditions of the existing contract, which they contended covered employees of the branch plant as well as those at Toledo (R. 121; 187). The

strike was averted when Gerity Junior assured the representatives that the Blissfield plant had been set up merely to "scare" a Michigan competitor and promised that if the Metal Polishers "would not cause him any trouble in Toledo," he would not cause them any trouble by expanding the Blissfield plant (R. 121; 188).

The Blissfield plant, however, did expand, its pay roll being increased about tenfold between April and December 1936 (R. 121; 471). Although employment at the Toledo plant decreased during a part of the year 1936 due to the fact that some of the Toledo business was being handled at the Blissfield plant, Gerity Junior obtained large orders for the latter part of 1936, upon which both plants worked, increasing employment substantially at both plants for several months (R. 121; 215, 217–218, 239–241, 390, 413, 417, 440–441, 468–469, 506).

Because of the expansion of the Blissfield plant, its business was moved to larger quarters at Adrian, Michigan, in January 1937 (R. 121; 323, 456, 508). No notice of this transfer was given to the Metal Polishers (R. 130; 188–189, 243). Thereafter, more machinery and supplies were transferred from the Toledo plant to the Adrian plant, as well as a few supervisory or skilled non-union employees (R. 122; 188, 222–223, 243, 419, 423, 426–427, 433). As at Blissfield, business was continued in the name of the Gerity-Whitaker

Company until March 5, 1937, when the Adrian enterprise was incorporated as the Gerity-Adrian Manufacturing Corporation (R. 122; 178, 224, 233, 239, 322–323, 419, 420, 421, 506). Gerity Junior became its president and Gerity Senior its vice president (R. 122; 177, 236).[3] Gerity Junior remained an officer of the Gerity-Whitaker Company and continued to handle its labor relations (R. 122; 424–425, 508–509).

Prior to the establishment of the Blissfield branch, Gerity Junior had been concerned principally with production work, especially automobile plate manufacturing, and had obtained a number of large orders for the Gerity-Whitaker Company from important customers, one of the largest of which was the Buick Motor Company (R. 119, 123, 126; 229, 231, 414, 444, 445). His father was concerned principally with replating jobs and, in a limited way, with production work (R. 126; 380, 437–438). With the opening of the Adrian plant, Gerity Junior began not only to obtain many new production orders for the Adrian plant but also to transfer more and more of the production business which had been done

[3] Gerity Senior, at all times an officer or director of Gerity-Adrian Manufacturing Corporation, left the management of the Adrian plant to his son (R. 236). He testified that he was "fed up on production work and the way the men acted, and * * * wanted to go back to where [he] was 20 years ago * * *, without having a strike on [his] hands every other day" (R. 219).

at the Toledo plant, including the Buick Motor Company business, to the Adrian plant, without a corresponding transfer of the employees, hiring instead new non-union labor at lower rates of pay (R. 123–125; 215, 224–228, 419–420, 408–410, 230–232, 239–241, 314, 528, 243). Thus, employment at Adrian increased from 44 in the latter part of January 1937 to 343 by January 1940, whereas during a corresponding period employment decreased from 44 to 5 at the Toledo plant (R. 124-125; 560, 564, Bd. Exhs. 14 and 17).[4]

After being laid off at the Toledo plant in January 1937, an employee who applied to Gerity Junior for employment at the Adrian plant was refused employment and told by Gerity Junior that "it was hard to get along with the Union" at Toledo and that by establishing the new plant "he was going to get away from the Union's interference" (R. 121; 249–250). Petitioners thereafter frustrated all attempts by the Metal Polishers to organize the Adrian employees. During the spring of 1937, as organizers for the Metal Polishers attempted to talk to and distribute union literature among employees as they emerged from the new plant, Gerity Junior and Foreman Williamson stood beside the organizers and by

[4] Gerity Junior continued to supply some automobile plate business for the Toledo plant until 1938, after which employment at that plant fluctuated between a high of 19 employees and a low of 4 during 1938 and 1939 (R. 227–228, 233, 561–564).

508841—43——2

their presence prevented many of the employees from accepting the literature or listening to the organizers (R. 131; 192, 257–258). Also in 1937, petitioners questioned applicants for employment at the Adrian plant concerning their union affiliations; warned employees against joining the Metal Polishers; attempted to thrust upon them an unaffiliated labor organization called the Die Casters League, to which petitioners contributed substantial financial support; and later in the year, in spite of the vote of a majority of the employees to affiliate with the American Federation of Labor, forced them to join an incorporated labor union, Independent Polishers & Finishers Union (herein called the Independent), with which petitioners entered into a closed-shop contract covering the Adrian plant and in behalf of which they checked off union dues (R. 131–135; 326–327, 290, 301, 288–293, 499–501, 294–302, 319, 337–338, 320, 545, Bd. Exhs. 36, 37, and 38).[5]

While petitioners were thus insuring themselves against the necessity of dealing with the Metal Polishers at the Adrian plant, they were meeting with the representatives of the Metal Polishers in regard to the lay-off of many employees of the Toledo plant and attempting to

[5] Petitioners executed similar contracts covering the Adrian plant with the Independent in 1938 and 1939 (R. 135; 546–551).

placate them with false promises to employ their laid-off members. In February 1937, when representatives of the Metal Polishers complained to Gerity Senior that the Gerity-Whitaker Company was operating a "runaway shop," Gerity Senior did not deny the accusation but assured them that "things would be straightened out" (R. 123–124; 189). In March, when a strike was threatened because of the failure of petitioners to give employment to the laid-off employees at either of their plants, Gerity Junior promised the Metal Polishers that the employees would be employed at Adrian before he would "see them unemployed" (R. 124; 189–190, 244). In October 1937, when another strike was threatened, both Geritys conferred with the Metal Polishers and agreed to employ 13 of the laid-off employees at the Toledo plant for 102 days (R. 124; 196, 197). This promise, like previous promises, was broken, for although these 13 employees were hired, they were released within 60 days (R. 124; 212, 213). In 1938, Gerity Junior assured the Metal Polishers "time and time again" that he would either put their laid-off members back to work at Toledo or would employ them at Adrian, and in August 1938 he made a definite commitment to employ four at Adrian immediately, two more by September 1, and all the remainder of the employees who had been laid off at Toledo before hiring any new men at Adrian (R. 124–125; 194–

195, 243–244, 538). Although he did employ the initial four, he failed to carry out the rest of his promise (R. 125; 200). Among the employees who were laid off at the Toledo plant because of the transfer of work to the Adrian plant and who were not reinstated at either plant, were the 29 employees named in the complaint and found by the Board to have been victims of petitioners' scheme to eliminate the Metal Polishers and evade the obligations of their contract with it (R. 127–128, 147; 557, Tr. 784–785).

The Board also found that petitioners discriminated in regard to the hire and tenure of employment of two additional employees, Keeling and Clark, who worked at the Adrian plant (R. 138–143). Keeling was one of the four employees of the Toledo plant who were given employment in August 1938 at the Adrian plant at the insistence of the Metal Polishers (R. 141; 264, 538).[6] He had been a member of the Shop Committee of the Metal Polishers at Toledo and soon after his employment at Adrian visited the Adrian employees at their homes in an attempt to enlist them as members (R. 141; 263, 266, 268, 269, 279). After failing to heed the warnings of Foreman

[6] Keeling and the other three Toledo employees were given the title of foremen at the Adrian plant to circumvent the terms of a seniority agreement with the Independent and worked under Foreman Williamson as polishers and buffers and instructed less experienced men (R. 141; 195, 265, 269, 270).

Williamson and Personnel Director Ennis that he refrain from activities in behalf of the Metal Polishers, he was discharged on October 11, 1938 (R. 142; 266–270, 525). The other employee, Clark, had been a member of the Metal Polishers prior to 1934, was suspected by petitioners of continued allegiance to the Metal Polishers, and warned by Superintendent Hammond and Foreman Williamson not to have anything to do with that organization (R. 132, 133, 134, 138; 287, 288, 290, 296, 300–302, 306). Following a short lay-off for lack of work, he was refused reinstatement in August 1938 because he had been voted out of the Independent and petitioners believed that he had lied about not continuing as a member of the Metal Polishers (R. 139–140; 306–310). The Board rejected defenses asserted by petitioners at the hearing that Keeling and Clark were discharged because their work was unsatisfactory and found that Keeling was discharged because of his membership and activities in behalf of the Metal Polishers and that Clark was not reinstated in August 1938 and thereafter because of petitioners' illegal closed-shop contract with the Independent and because of their opposition to the Metal Polishers (R. 141, 143).

The Board found that in October 1939, upon receiving a notice from one Reuther at the Buick Motor Company in Detroit, one of petitioners'

chief customers, that products would not there after be accepted unless "made by the C. I. O.," petitioners assisted the National Association of Die Casting Workers (herein called the D. C. W.), affiliated with the C. I. O., in organizing the Adrian employees and on October 30, 1939, signed a closed-shop contract covering the Adrian plant with that organization (R. 143–146; 346–347, 478–483, 361–362, 364).

Upon the foregoing facts the Board concluded (R. 127, 147) that "apart from business considerations," the desire of the Gerity-Whitaker Company to "thwart the Metal Polishers and to evade" its obligations under the contract and under the Act was a substantial cause for the establishment of the Blissfield plant within six months after the execution by the Gerity-Whitaker Company of its first contract with the Metal Polishers and within one month after the execution of its second contract providing for increased wages, and for the subsequent removal of the bulk of its business to Adrian. The Board held that the Gerity-Whitaker Company, by opening the Blissfield and Adrian plants and forming and establishing the Gerity-Adrian Manufacturing Corporation, violated Section 8 (1) of the Act (R. 127). The Board found that by failing to discuss in advance with the Metal Polishers the removal of operations to Blissfield and then to Adrian,

thereby determining unilaterally a subject concerning terms and conditions of employment, and by deceiving the Metal Polishers in regard to its intentions in moving such operations, petitioner Gerity-Whitaker Company refused to bargain with the Metal Polishers within the meaning of Section 8 (5) and (1) of the Act (R. 130–131); that by laying off the 29 employees from the Toledo plant and thereafter refusing to reinstate them at either the Toledo or Adrian plants, by discharging Keeling because of his membership and activities in the Metal Polishers, and by refusing to reinstate Clark because of the illegal closed-shop contract with the Independent and petitioners' opposition to the Metal Polishers, petitioners discriminated in regard to the hire and tenure of employment of these employees within the meaning of Section 8 (3) and (1) of the Act (R. 128, 141, 143); that by dominating and interfering with the formation and administration of the Independent and contributing support thereto, petitioners violated Section 8 (2) and (1) of the Act (R. 135-137); and that by unlawfully rendering assistance to the D. C. W. and otherwise interfering with, restraining, and coercing their employees in the rights guaranteed them by the Act, petitioners violated Section 8 (1) of the Act (R. 146).

The Board's order required petitioners to cease and desist from their unfair labor practices; required petitioner Gerity-Whitaker Company,

upon request, to bargain collectively with the Metal Polishers; and required petitioners Gerity-Whitaker Company and Gerity-Adrian Manufacturing Corporation to withhold recognition from the Independent and from the D. C. W., to cease giving effect to any contract with the D. C. W., to reimburse each of their employees, whose dues to the Independent were checked off, for the amounts deducted from their wages,[7] to reinstate with back pay (less net interim earnings) the 31 employees[8] against whom they had discriminated, and to post appropriate notices (R. 152–155).

---

[7] The court below refused to enforce that part of the Board's order requiring petitioners to reimburse their employees for the dues checked off under the closed-shop contract with the Independent (R. 583). We respectfully reserve the right to object to such portion of the decree below in the event that a writ of certiorari is granted to petitioners. See *National Labor Relations Board* v. *Virginia Electric & Power Co.* (C. C. A. 4th), decided December 9, 1942.

[8] Petitioner's assertion (Pet. 26–28; see R. 128) that some of the 31 employees should not have been ordered reinstated because they were temporary employees is without any support in the evidence. So far as appears they were all hired on a permanent basis. They were hired through the Metal Polishers as provided in its contract with the Gerity-Whitaker Company (R. 398–399, Bd. Exh. 19, Art. III, Sec. C), and under the terms of that contract had acquired seniority rights by completing 30 days of employment (R. 204–206, 557, Tr. 954–955, Bd. Exh. 19, Art. VI, Sec. B; Bd. Exh. 20, Art 6, Sec. C). They worked at the Toledo plant for periods ranging from one month to two years (R. 557, Tr. 784–785, 954–955). Moreover, neither Gerity Senior nor Gerity Junior ever excepted them from their repeated blanket promises to see all laid-off members of the Metal Polishers employed at either Toledo or Adrian before

On December 26, 1941, the Board filed in the court below a petition for enforcement (R. 1–8), and on June 1, 1942, the court handed down its opinion and decereе (R. 583) enforcing the Board's order except in the respect heretofore noted (*supra,* n. 7, p. 14).

ARGUMENT

1. Petitioners contend that there is not substantial evidence to support the Board's finding that, apart from business considerations, a substantial cause of the transfer to Blissfield and then to Adrian of part of the Toledo business and equipment was petitioner Gerity-Whitaker Company's plan to thwart the Metal Polishers and to evade its obligations under the contract with that union and under the Act. Petitioners contend also that there is not substantial evidence to support the Board's finding that the Gerity-Whitaker Company refused to bargain with the Metal Polishers and that petitioners discriminated in regard to the hire and tenure of employment of 31 of their employees. These contentions present no questions of general importance. Moreover, they are without merit. Petitioners seek to support their contentions by

---

any new workers were hired (R. 189–190, 194–197, 212–213, 538). Upon these facts the Board properly held these employees were the objects of the petitioners' unlawful discrimination fully as much as the rest of the 31 (R. 128).

their Statement and Argument (Pet. 8–15, 16–28) which omit most of the important evidentiary facts found by the Board, upon which the Board based its ultimate findings. Upon the full facts found by the Board, reviewed in our statement, and supported by substantial evidence which we have cited (*supra*, pp. 3–15), the Board's findings of unfair labor practices were plainly warranted.

2. Petitioners apparently contend (Pet. 28–30) that the decision below, insofar as it enforced the order of the Board requiring them to reinstate the 31 employees discriminated against, is in conflict with *National Labor Relations Board* v. *Air Associates, Inc.*, 121 F. (2d) 586 (C. C. A. 2). Petitioners erroneously assert that it was held in that case that under Section 8 (3) "there must be substantial evidence not only that the purpose of the discharge was to discriminate against Union membership, but also that the unlawful purpose of discrimination had the desired effect, *viz.*: The discouragement of Union membership" (Pet. 28). The portion of the opinion in the *Air Associates* case upon which petitioners rely concerned the discharge by an employer of two employees whom it believed to be non-union men in order to make room for two union officials who had been previously discharged. The court, in an amended opinion held that on these special facts there were no "findings from which such an effect might reasonably be inferred" (121 F. (2d) at

592). And, as the same circuit subsequently pointed out in *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 937, the *Air Associates* opinion should be "very narrowly limited" to its own peculiar facts under which the court could discover no "rational basis for a conclusion that the discharge violated the Act; for an employer to tell men whom, so far as the record showed, he thought to be non-union men that they must be dismissed to make room for union men, would not necessarily tend to discourage union membership."[9] While the Board disagrees with the court's conclusion in the *Air Associates* case, the express limitation of that case to its facts precludes a claim of conflict with the instant case. Moreover, the Board's consistent view that discrimination against employees for union reasons necessarily discourages union membership—at the very least, on the part of employees who are victims of the discrimination—has been implicitly upheld by this Court (and by the circuit courts of appeals in decisions

[9] In *Stonewall Cotton Mills, Inc.* v. *National Labor Relations Board*, 129 F. (2d) 629 and 129 F. (2d) 633, certiorari denied, October 19, 1942, No. 346, present Term, the Circuit Court of Appeals for the Fifth Circuit at first upheld the view for which petitioners here contend, but on the Board's petition for rehearing the Court reversed, or at least seriously modified, its position and held that the Board properly inferred that a discriminatory discharge had the effect of discouraging union membership despite the absence of any "positive evidence" that it had such effect.

too numerous to cite) in many cases involving violations of Section 8 (3) of the Act, wherein the Board has found violations of the Section simply upon supported findings of discrimination and without other evidence of discouragement. *E. g., Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 129; *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 589, 598, 600, 603; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 185–186. See also S. Rep. No. 573, 74th Cong., 1st sess., p. 11; H. Rep. No. 1147, 74th Cong., 1st sess., p. 19.

3. Petitioners' contention (Pet. 28–30) that the 31 employees whom the Board has ordered reinstated are not employees within the meaning of the Act is based upon the assumption that petitioners did not discriminate in regard to the hire and tenure of employment of such employees and is clearly without merit. As shown in our statement (*supra,* pp. 10–11) the employment of all of the 31 employees ceased because of petitioners' unfair labor practices. They therefore remained employees within the meaning of Section 2 (3) of the Act and the Board's order requiring their reinstatement was the usual and appropriate remedy for petitioners' unfair labor practices. However, even if the 31 employees, or any of them, were not employees of petitioners at the time petitioners discriminatorily refused to em-

ploy them, they are nevertheless protected under the Act from petitioners' discrimination against them for union reasons and may properly be ordered reinstated. *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177.

CONCLUSION

The decision of the court below, insofar as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition should, therefore, be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
WALTER J. CUMMINGS, Jr.,
Attorney.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
RUTH WEYAND,
FANNIE M. BOYLS,
Attorneys,
National Labor Relations Board.

FEBRUARY 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act, (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all

the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: * * *

* * * * *

SEC. 10 * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

(3V)

IN THE

Supreme Court of the United States

October Term, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

MILO WARNER,
1631 Nicholas Bldg.,
Toledo, Ohio,

HALL & DEVLIN,
528 Nicholas Bldg.,
Toledo, Ohio,
Attorneys for Petitioners.

FILED
MAR 8 1943
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

---

PETITION FOR REHEARING AND REPLY OF PETITIONERS TO RESPONDENT'S BRIEF

MILO WARNER,
1631 Nicholas Bldg.,
Toledo, Ohio,

HALL & DEVLIN,
528 Nicholas Bldg.,
Toledo, Ohio,

Attorneys for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1942

No. 622

THE GERITY-WHITAKER COMPANY AND GERITY-ADRIAN MANUFACTURING CORPORATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF

Two important questions were raised by the petition in this proceeding. First, it is contended that the evidence does not sustain the charge nor the finding of fact and the conclusion of law that Gerity-Adrian Manufacturing Corporation is the "*alter ego*" of The Gerity-Whitaker Company. Second, it is sincerely contended by the petitioners that the remedy invoked by the Board and approved by the enforcement order is unlawful in that there is no legal justification for the provision in said order directing reinstatement to a temporary position with back pay from January, 1937, to the persons designated in said order.

In the brief of the respondent, it is stated (pp. 2 and 15) "That apart from business considerations, a substan-

tial cause of the transfer to Blissfield and then to Adrian of part of the Toledo business and equipment was petitioner, Gerity-Whitaker Company's plan to thwart metal polishers and to evade its obligations under the contract with the Union and under the Act."

The foundation of the complaint in this case against these petitioners is the charge that The Gerity-Whitaker Company transferred its manufacturing operations out of Toledo and into Michigan; that the alleged transfer was the result of a plan to evade a contract with the Union of its employees; that Gerity-Adrian Manufacturing Corporation, organized in Michigan in 1937, is the "*alter ego*" and agent of The Gerity-Whitaker Company and that Gerity-Adrian is in fact Gerity-Whitaker.

If Gerity-Whitaker established a runaway shop or transferred its business into another state, under a different name, the record should disclose some evidence of participation in this scheme or plan by The Gerity-Whitaker Company and its owner. In answer to this proposition, permit us to point out the following undisputed facts:

1. It is conceded that at all times James J. Gerity "still held all the stock in the company (Gerity-Whitaker Company), except for the qualifying shares and refused to comply with his son's request for a redistribution of the stock." (R. p. 119.)

2. It is conceded that James J. Gerity, owner of Gerity-Whitaker Company, never participated in the establishment or in any business in Blissfield or Adrian (R. p. 61) and that neither James J. Gerity nor Gerity-Whitaker Company hold any stock in Gerity-Adrian; that neither of them have ever received any consideration from Gerity-Adrian except for work performed for that company. (R. pp. 395, 396, 397, 439, 456, 457.)

3. It is conceded that neither James J. Gerity nor Gerity-Whitaker Company have ever participated in the formation, management, direction or policy of any business in Michigan, or of Gerity-Adrian Manufacturing Corporation. (R. p. 61 and references under No. 2 above.)

4. It was proven that the investment in machinery and equipment of James Gerity, Jr., in the Michigan business was $13,750.00 (R. p. 579) of which amount only $1,800.00 of machinery and equipment was acquired from Gerity-Whitaker Company. (R. p. 223.)

5. The Board could only find suspicion in the manner of transfer by Gerity-Whitaker Company of accounts recorded in 1936 to James Gerity, Jr., at Adrian, Michigan (R. p. 126, "The suspicious circumstances inhering in respondent's treatment of accounts transferred from Gerity-Whitaker to Gerity-Adrian as property of James Gerity, Jr.").

6. The absolute disregard by the Board and counsel for the facts and evidence hereinabove referred to and the refusal of the Board and counsel to concede the possibility of the conflict in the business objectives and policy of James J. Gerity and James Gerity, Jr., to effect and bring about their separation as partners and to conduct their independent business enterprises.

7. The failure of counsel or the Board to discuss and declare the legal considerations, essentials and elements of the doctrine of *"alter ego"* and of "the runaway shop" as applied to the evidence in the proceeding. The record contains no evidence of any act or plan on the part of Gerity-Whitaker to establish a runaway shop. There was no labor dispute. There was no diminution in employment for a matter of twenty months after the alleged establishment of a runaway shop. There is no evidence that Gerity-

Whitaker Company has directly or indirectly participated in the formation, operation or direction of Gerity-Adrian or received any return or made any investment in that business, all of which considerations are essential to the proof of the doctrine of *"alter ego"* and necessary conditions to the legal conclusion justifying and sustaining such a judgment.

The suggestion is made for some reason on page 3 of respondent's brief that "Gerity-Whitaker was operated as a non-union shop until October 21, 1935." There is not a single word of testimony or a shred of evidence in the record that The Gerity-Whitaker Company ever operated a non-union shop. We are no experts on labor law, but it has always been our understanding that a non-union shop was one where union men were not employed; that an open shop was one where organized and unorganized workers were employed; that a closed shop was one where only organized workers were employed. Until now, there was never any suggestion that The Gerity-Whitaker Company operated a non-union shop. The business agent of the Union testified (R. p. 181) that union men were employed when he was hired by The Gerity-Whitaker Company in the year 1934.

We also wish to point out that when the Board quotes from the testimony of the only witness who testified that James Gerity, Jr., proposed to get away from Union interference by starting a business in the State of Michigan and when respondent refers to this testimony in the brief, but half the statement of the witness is quoted and that portion which supports the testimony of Mr. Gerity is omitted. We quote from the record, page 249, the answer of the witness, John Eldridge, as follows:

> "He (James Gerity, Jr.) made the statement that inasmuch as he and his father could not agree on all subjects, he decided to get out for himself. He

started up his own plant, and he said along with him and his father's difficulties, that it seemed as though it was hard to get along with the Union and he said he was going to get away from the Union's interference."

On page 9 of respondent's brief, it is argued "In February, 1937, when representatives of the Metal Polishers complained to Gerity, Sr., that The Gerity-Whitaker Company was operating a runaway shop, Gerity, Sr., did not deny the accusation, but assured them that things would be straightened out."

What does the record disclose? The record discloses that the business agent of the Union complained that in December, 1936, employment was "practically cut right down to nothing." On the day the meeting with the employer occurred, Exhibit 41 (R. p. 560) shows thirty-eight men were employed and that in December of 1936 several times the total average employment was on the payroll of the employer. In this connection, the Board finds among its conclusions of fact (R. p. 121) "The normal average employment was thirty to forty employees."

On page 15 of respondent's brief, it is stated "Petitioners contend also that there is not substantial evidence to support the Board's finding that The Gerity-Whitaker Company refused to bargain with the Metal Polishers and that petitioners discriminated in regard to hire and tenure of employment of thirty-one of its employees. These contentions present no questions of general importance. Moreover, they are without merit."

At the risk of being repetitious, permit us to point out what we believe to be the undisputed and material evidence on this point.

1. Seventeen of the persons ordered reinstated with allowance of three or more years back pay were undisputedly shown to have been temporary employees, hired approximately six months after the runaway shop is alleged to have been established and their employment occurred at a time when Gerity-Whitaker Company was hiring more than double its normal number of workmen. (R. pp. 411, 412, 435; Stipulation 465-66-67, 470, 471.)

2. The Board found (R. p. 121) that on January 15, 1937, about eighty employees were laid off at the Toledo plant, which for the preceding ten weeks had been employing about three times its normal complement of thirty to forty employees.

3. The Gerity-Whitaker Company continued to employ its normal complement of thirty to forty employees on the average weekly basis during the year 1937.

4. For the week ending November 27, 1936, Gerity-Whitaker Company gave employment to one hundred and twenty-eight workmen (Board Ex. 41-R, p. 560). This date was about eight months after it is charged the petitioner transferred operations into another state by the device of a runaway shop. During this particular week employment was three and a half times average normal employment on the basis of the preceding three-year average.

5. Of the approximately ninety extra and temporary employees, seventeen have been ordered reinstated, presumably to full time employment with full time pay from January, 1937. There is no reason why, if seventeen temporary employees could be ordered reinstated with back pay, the additional seventy-three employees could not like-

wise be granted the same remedy. Thus, the remedy which the Board has invoked and which the respondent would have sustained could clearly require the employer to hire and pay three or more times its average number of employees. The only connection or foundation for the granting of such remedy would apparently be the fact that the persons ordered reinstated had temporary employment at one time with such employer.

When counsel charged (Brief p. 18) that "The employment of all the thirty-one employees ceased because of petitioners' unfair labor practices," the answer seems to suggest itself that employment was given to eighty or ninety unemployed members of this Union, even though it was temporary, when such workmen were without employment at their usual and regular places of employment in Toledo. Since the employer in 1936 regularly hired only from thirty to forty workmen and gave temporary employment to one hundred and twenty workmen, it did not engage workmen who had previously been employed by it or who were on its payroll when it is asserted the runaway shop was set up in March and April of 1936. To the contrary, it seems clear that in 1936 and 1937, Gerity-Whitaker Company increased employment and that this undisputed fact dissolved the foundation upon which the complaint against it is laid.

We respectfully urge that the questions involved in this proceeding are not without merit; that the reversal of the unlawful and unauthorized order is required to remove a dangerous and unlawful precedent.

Respectfully submitted,

MILO J. WARNER,
HALL & DEVLIN,
Counsel for Petitioners.